

NGUYEN HONG QUANG v. PP

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COURT OF APPEAL, PUTRAJAYA

DAVID WONG DAK WAH JCA

PRASAD SANDOSHAM ABRAHAM JCA

MARY LIM JCA

[CRIMINAL APPEAL NO: Q-05-13-01-2015]

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21 OCTOBER 2016

CRIMINAL LAW: *Murder – Conviction and death sentence – Appeal against – Prosecution’s case based on circumstantial evidence – Whether prosecution established prima facie case to warrant calling of defence of accused person – Whether failure to call material witness left gap in prosecution’s case – Whether conviction safe*

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CRIMINAL PROCEDURE: *Appeal – Grounds of – Accused convicted of murder – Trial judge delivered non-speaking judgment – Whether trial judge conducted maximum evaluation of totality of evidence – Whether prejudiced by reliance on hearsay evidence – Whether prosecution established prima facie case to warrant calling of defence of accused person – Whether appeal meritorious*

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EVIDENCE: *Adverse inference – Failure of prosecution to call material witnesses – Whether court entitled to draw inference it deems fit – Whether there was gap in prosecution’s case – Whether prosecution established prima facie case*

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The appellant was charged for an offence of murder under s. 302 of the Penal Code for the death of Captain Ngo Tong Cuong (‘the deceased’) on board of a vessel, Brave Ocean. ASP Abdul Samat (‘PW13’) who went to the scene was informed by the local shipping agent that the place of the incident was inside the captain’s cabin and was further informed by the crew of the vessel that the suspect was the appellant. The appellant was thus arrested. The chief officer of the vessel informed PW13 that the knife used by the appellant was in his possession and had been seized from the appellant’s hand. The DNA analysis revealed a mixed profile contributed by at least two sources, one of it was that of the deceased. The presence of the DNA of the appellant was found on the handle of the knife. The post mortem report concluded that the cause of death was chest injuries caused by stab wounds. The High Court Judge (‘HCJ’) concluded that the totality of the prosecution’s evidence, which essentially was circumstantial evidence, was such that it could only be the appellant who had killed the deceased, relying mainly on the appellant’s DNA profile found on the knife handle. The appellant was thus called to enter his defence. The appellant opted to give a statement from the dock which the HCJ found did not raise a reasonable doubt on the prosecution’s case and hence, convicted the appellant and sentenced him to death by hanging. Hence, this appeal by the appellant on grounds, *inter alia*, that the HCJ had handed down a ‘non-speaking judgment’ in that the HCJ had failed to give maximum evaluation to the totality of the evidence before him.

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A Held (allowing appeal; setting aside order of High Court)**Per David Wong Dak Wah JCA delivering the judgment of the court:**

- B** (1) There was little doubt that whatever that was said to PW13 by the two witnesses, *ie*, the crew members of the vessel, were hearsay and inadmissible. Further, based on the fact that the Deputy Public Prosecutor did not rebut it, the HCJ should have expunged the evidence. The HCJ could have been prejudiced by his reliance on the hearsay evidence. (para 20)
- C** (2) Evaluating the evidence in its totality in the context of a murder charge, the prosecution had not proven a *prima facie* case to warrant the appellant to enter his defence. The prosecution had left a gaping hole in its case by not calling the two material witnesses, who would have provided vital evidence as to why one of them had concluded that it was the appellant who had killed the deceased. When material witnesses are not called, the court is entitled to draw inference as it deems fit. (para 22)
- D** (3) In his findings, the HCJ relied on the presence of the appellant's DNA on the knife handle and the deceased's blood stains on the appellant. The HCJ had failed to give due consideration to the evidence elicited from cross-examination of the scientific officer relating to the possibility of a third person's DNA on the handle of the knife. In view of the fact that
- E** the prosecution's case was premised on circumstantial evidence, the unexplained third person left a gap in the prosecution's case. Had the two witnesses testified in court, the missing link to the prosecution's case could have been found. (para 23)
- F** (4) Further, the evidence of the forensic witness that the stab wounds on the deceased could be caused by another weapon based on the width of the wound and the knife, was not satisfactorily explained. Hence, there were merits in the appellant's appeal and the HCJ should not have called the appellant to enter his defence at the end of the prosecution's case as a
- G** *prima facie* case had not been proven. The conviction was thus rendered unsafe. (paras 24-26)

Bahasa Malaysia Headnotes

- Perayu dipertuduh dengan kesalahan membunuh bawah s. 302 Kanun Keseksaan atas kematian Kapten Ngo Tong Cuong ('si mati') di atas kapal
- H** Brave Ocean. ASP Abdul Samat ('PW13') yang telah ke tempat kejadian dimaklumkan oleh ejen perkapalan tempatan bahawa tempat kejadian adalah di dalam kabin kapten dan selanjutnya diberitahu oleh anak kapal tersebut bahawa suspek adalah perayu. Perayu oleh itu ditangkap. Ketua pegawai kapal tersebut memberitahu PW13 bahawa pisau yang digunakan oleh
- I** perayu ada dalam milikannya dan telah dirampas daripada tangan perayu. Analisis DNA mendedahkan profil bercampur yang disumbangkan oleh sekurang-kurangnya dua orang sumber, salah satu daripadanya adalah si mati. Kehadiran DNA perayu ditemui pada pemegang pisau tersebut.

Laporan bedah siasat menyimpulkan sebab kematian adalah kecederaan pada dada yang disebabkan oleh luka tikaman. Hakim Mahkamah Tinggi ('HMT') memutuskan bahawa keseluruhan keterangan pendakwaan, yang pada asasnya adalah keterangan ikut keadaan, adalah sedemikian bahawa hanya perayu yang telah membunuh si mati, bersandarkan secara asasnya pada profil DNA perayu yang didapati pada pemegang pisau itu. Perayu oleh itu, diarahkan membela diri. Perayu memilih untuk memberi kenyataan dari kandang saksi yang mana HMT dapati tidak membangkitkan keraguan munasabah atas kes pendakwaan dan dengan itu, mensabitkan perayu dan menjatuhkan hukuman gantung hingga mati. Oleh itu, rayuan ini oleh perayu atas alasan, antara lain, bahawa HMT menyampaikan 'non-speaking judgment' di mana HMT gagal membuat penilaian maksimum terhadap keseluruhan keterangan di hadapannya.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

- (1) Terdapat sedikit keraguan sama ada apa yang dinyatakan kepada PW13 oleh kedua-dua saksi, iaitu, anak kapal tersebut, adalah cakap dengar dan tidak boleh diterima. Selanjutnya, berdasarkan fakta bahawa Timbalan Pendakwa Raya tidak mematahkannya, HMT sepatutnya membatalkan keterangan tersebut. Hakim Mahkamah Tinggi mungkin diprejudis oleh sandarannya pada keterangan dengar cakap.
- (2) Menilai keterangan secara keseluruhannya dalam konteks pertuduhan membunuh, pihak pendakwaan tidak membuktikan kes *prima facie* yang mewajarkan perayu memasukkan pembelaannya. Pihak pendakwaan meninggalkan lompong dalam kesnya dengan tidak memanggil dua saksi penting tersebut, yang mungkin memberikan keterangan penting mengapa salah seorang daripada mereka memutuskan bahawa perayu yang membunuh si mati. Apabila saksi penting tidak dipanggil, mahkamah berhak membangkitkan inferens yang dianggap sesuai.
- (3) Hakim Mahkamah Tinggi menyandar atas kehadiran DNA perayu pada pemegang pisau dan kesan darah si mati pada perayu dalam dapatannya. Hakim Mahkamah Tinggi gagal memberikan pertimbangan yang sewajarnya pada keterangan yang didapati daripada pemeriksaan balas pegawai saintifik berkaitan kemungkinan DNA orang ketiga pada pemegang pisau tersebut. Berdasarkan fakta bahawa kes pihak pendakwaan adalah berasaskan keterangan ikut keadaan, ketiadaan penjelasan tentang orang ketiga meninggalkan lompong dalam kes pendakwaan. Jika dua orang saksi tersebut memberi keterangan, kaitan yang hilang dalam kes pendakwaan mungkin boleh ditemui.

- A (4) Selanjutnya, keterangan saksi forensik, bahawa luka tikaman si mati mungkin disebabkan oleh senjata yang satu lagi berdasarkan lebar luka dan pisau, tidak dijelaskan dengan sewajarnya. Dengan itu, terdapat merit dalam rayuan perayu dan HMT tidak sepatutnya memanggil perayu membela diri di akhir kes pendakwaan kerana kes *prima facie* tidak dibuktikan. Oleh itu, sabitan yang diputuskan tidak selamat.
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Legislation referred to:

Evidence Act 1950, s. 114(g)

Penal Code, s. 302

For the appellant - Orlando Chua; M/s Wong Orlando Chua & Kuok Advocs

- C *For the respondent - Awang Armadajaya Awang Mahmud; DPP*

[Editor's note: For the High Court judgment, please see PP v. Nguyen Hong Quang [2015] 1 LNS 1139 (overruled).]

Reported by S Barathi

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JUDGMENT

David Wong Dak Wah JCA:

Introduction

- E [1] This is an appeal against the decision of the High Court Judge in which the learned judge convicted and sentenced the appellant on the ground that the appellant/accused had failed to raise a reasonable doubt in the prosecution case for murder under s. 302 of the Penal Code.

[2] The charge against the appellant reads as follows:

- F That you, NGUYEN HONG QUANG (M) (VIETNAM) (PASSPORT NO. B 684829) on the 22nd March 2013, at about 12.30am inside the Vessel M.V. Brave Ocean, at Tanjung Manis Anchorage, Sungai Rajang, in the District of Sarikei, in the State of Sarawak, did commit murder by causing the death of one, Ngo Trong Cuong (M) (VIETNAM)
- G (PASSPORT NO. B 18212593) and you thereby committed an offence punishable under section 302 of the Penal Code.

[3] We heard the appeal and after due consideration to respective submissions of counsel, we unanimously allowed the appeal and set aside the order of the High Court and our reasons are these.

H **Background Facts**

- I [4] The facts of the case have been set out by the learned DPP in his submission and we adopt it with some appropriate amendments. On 22 March 2013, PW14 Lim Kie Jeong, who was the local shipping agent, was on board on a vessel named Brave Ocean (the vessel) when he was informed by the crew that something happened in the captain's cabin of the vessel while he was on board. PW14 then went to the captain's cabin and

he saw that Captain Ngo Trong Cuong (the deceased) was lying on the floor, with blood all over parts of the cabin. The deceased was then taken to Sarikei Hospital where PW10 Michael Anak Tandang, the Assistant Medical Officer of Sarikei Hospital confirmed the death of the deceased.

[5] Subsequently, on being informed of a possible crime being committed, PW13 ASP Abdul Samat bin Amit on the same day together with his police team boarded the vessel. PW13 was then informed by PW14 that the place of the incident of the possible crime was inside the captain's cabin at the upper deck of the vessel. PW13 was also informed by the crew of the vessel that the suspect is named Nguyen Hong Quang (the appellant), and premised on that information, PW13 arrested the appellant.

[6] PW13 then went to the captain's cabin and found that there were a lot of blood stains on the floor and on the sofa. There were also some blood stains on the walls.

[7] The chief officer of the vessel one Ta Trung Minh then informed PW13 that the knife used by the appellant was in his possession and had been seized from the appellant's hand. The said Ta Trung Minh then took PW13 and his police team to his room where he showed PW13, the knife which was subsequently seized as an exhibit.

[8] Samples of blood stains were taken from the ears of the appellant and it is undisputed that the DNA analysis from the aforesaid samples revealed a mixed profile that was contributed by at least two sources, one of which was that of the deceased. DNA analysis on the bloodstains found on the seized knife revealed the presence of the DNA of the appellant on the handle of the knife.

[9] The post mortem report (exh. P35) on the deceased prepared by PW12 the pathologist who revealed that the cause of death was chest injuries caused by stab wounds.

High Court

[10] In our view, the High Court Judge had correctly set out the elements required to be proved by the prosecution for a *prima facie* case to be established at the end of the prosecution case. Briefly, these elements are these:

- (a) That the deceased is Ngo Trong Cuong (M) (Vietnam) (Passport No. B 18212593);
- (b) That the deceased died as a result of the injuries sustained by him?; and
- (c) That it was the appellant who had caused those injuries which led to the death of the deceased.

[11] In view of the undisputed evidence concerning the identification of the deceased and the cause of death (pathologist report), elements (a) and (b) were easily proven by the prosecution.

- A [12] In respect of the third element as of whether it was the appellant who had caused the injuries, the learned judge acknowledged that the prosecution's case was premised on circumstantial evidence as there was no eyewitness to the crime so to speak. Premised on that the learned judge concluded that, in his view the totality of the prosecution's evidence is such
- B that it could only be the appellant who had killed the deceased, relying mainly on the appellant's DNA profile found on the knife handle. This is what the learned judge said:

- C Taking all the above in totality, and considering all the circumstances of the case, the irresistible conclusion points towards no one other than the Accused who had inflicted the fatal stab wounds upon the Deceased which caused the death of the Deceased on the day and time in question. This Court was therefore satisfied that the prosecution had proven the ingredients of the offence of murder under section 300 of the Penal Code and punishable under section 302 of the same Code.

- D Hence defence was called by the learned judge.

[13] The appellant opted to give a statement from the dock which the learned judge found that it did not raise a reasonable doubt in the prosecution's case and hence convicted the appellant and sentenced him to death by hanging.

E **Our Grounds Of Decision**

[14] The main complaint of learned counsel for the appellant was mainly that the learned High Court Judge had handed down a "non-speaking judgment" in that the learned judge had failed to give maximum evaluation of the totality of evidence before him.

- F [15] According to learned counsel for the appellant, the learned judge's first failure of maximum evaluation was the failure to realise much of the evidence relied on by the learned judge was, in fact, hearsay and inadmissible. These evidence were that of the two crew members of the vessel, namely Nguyen Van Khiet and Ta Trung Minh. It was submitted that
- G these two crew members were never called as witnesses nor were they offered to the defence of the prosecution case. Hence the learned judge should not have referred to what they have said to PW13 and in the police report (P37).

- H [16] The aforesaid mentioned Nguyen Van Khiet was featured in the learned judge's grounds as follows:

- I PW13 was also being informed by the crew of the said vessel that the suspect is named Nguyen Hong Quang, the Accused and he was inside his room ie in the Engineer's room which was located beside the Captain's cabin.

[17] As for exh. P37, the learned judge allowed the full police report to be admitted despite the fact that there was incriminatory evidence contained therein. Those evidence were these. When PW13 went to the crime scene on the vessel, he was informed by Ta Trung Minh, the chief officer of the vessel, that the knife (P26(A)) was used by the appellant to harm the deceased and it was seized from the appellant's hand.

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[18] Learned counsel also submitted that adverse inference should be drawn against the prosecution for not calling those two witnesses as they would be material witnesses to the prosecution case. Further, learned counsel relied on the fact that the maximum width of the knife was up to 5.5cm while the wounds were from 6cm to 10cm to submit that the P26(A) could not be the knife used in the stabbing.

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[19] In rebuttal, learned DPP submitted that there was no allegation by the appellant that the two aforesaid witnesses had reasons to frame the appellant of the crime. Further, it was submitted that in view of the presence of blood stains of the deceased found on the appellant's body and the appellant's DNA found on the knife's handle, hence the non-calling of the two aforesaid witnesses were non-consequential.

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[20] In our considered view, there was little doubt whatever was said to PW13 by two aforesaid witnesses were hearsay and inadmissible. This was not disputed by the learned DPP as we did not find anything in his submission to rebut it. That being the case, the learned judge should have expunged those evidence. But that was not what happened here. In fact, the learned judge had relied on those hearsay evidence and in our view could have been prejudiced by it. Be that as it may, we went on to examine the remaining evidence in the form of DNA evidence linking to the killing of deceased and we had asked ourselves the pivotal question of whether it was the appellant who had inflicted the fatal stab wounds to the chest of the deceased.

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[21] In answering that question, we were fully aware that at the end of the prosecution case, the prosecution's evidence must be such that if the appellant had remained silent, the court must be willing to convict. What that meant, in our considered view, was simply that the prosecution had proven its case beyond reasonable doubt.

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[22] Having evaluated the evidence in its totality in the context of a murder charge, we had found that the prosecution had not proven a *prima facie* case to warrant for the appellant to make his defence and our reasons are these. Firstly, without the two vital witnesses mentioned earlier, we found that the prosecution had left a gaping hole in its case. These two witnesses were material witnesses to the crime and would have provided vital evidence as to why one of them had concluded that it was the appellant who had killed the deceased. As to why they were not called, the notes of proceedings did

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A not provide any insight at all. As pointed out by learned counsel for the appellant, it was intimated by the prosecution in its opening statement (p. 5 Jilid 1) that these two witnesses would be called but at the end of prosecution case, not only were they not called they were not even offered to the defence. In our view, mindful that the prosecution is fully entitled to call whoever it so wishes but when material witnesses were not called, the court is entitled to draw inference as it deems fit. In this case, though we draw no s. 114(g) of the Evidence Act 1950 inference, we however found that the calling of these two witnesses could have helped fill in the deficiencies in the remaining evidence which we now deal with.

C [23] As pointed out earlier, the learned judge relied on the presence of the appellant's DNA on the knife handle and deceased's blood stains on the appellant in his findings. With respect, the learned judge failed to give due consideration to the evidence elicited from cross-examination of PW11, the scientific officer, relating to the possibility of a third person's DNA on the handle of the knife. For clarity, we set out the relevant part of the note of proceeding (see Q282 – p. 64 Jilid 1).

E Q281 Referring to page 3 at paragraph (b) of P9. You said in your report “the DNA profile developed of swab of handle of knife E11 and blood stains indicated on cotton swab E12 revealed that it was a mix profile consistence that a being contributors by at least by two sources”. In other words, that could have been more than two sources?

F A It depends because after the sentence that I said at least two sources, I stated that the sources represented by blood specimen 1 and blood specimen E13 were consistence as being the two contributors which means that only these two person were the two contributors of this mix profile.

G Q282 Referring to paragraph (d) of the same page at P9. It could be i.e. the blood stains belong to an unknown third party not named by you in this entire report?

G A It could be.

H This point was not alluded to by the learned judge nor was it explained in re-examination of PW11 as to who that person was or could be. In view of the fact that the prosecution's case was premised on circumstantial evidence, this unexplained third person left a gap in the prosecution case. Had the two witnesses testified in court, they could have found the missing link to the prosecution case.

I [24] Another piece of evidence which we found troubling was the testimony of PW12 (the forensic witness) that the stab wounds on the deceased could be caused by another weapon as the width of the wounds were from 6cm to 10cm while the maximum width of the knife was only 5.5cm. This again was not satisfactorily explained.

[25] Premised on the above analysis of the evidence, we were of the view that there were merits in the appellant's appeal and hence found that the learned judge should not have called the appellant to enter his defence at the end of the prosecution case as a *prima facie* case had not been proven. In view of our findings, we did not find it necessary to comment on the unsworn statement of the appellant.

Conclusion

[26] For reasons stated above, we find that the conviction unsafe. Accordingly, we allowed the appeal and set aside the High Court order. The appellant is acquitted and discharged.

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